

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs,

-V-

Case Number:
07-13164

APPLE COMPUTER, INC., and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants,

_____ /

MOTIONS
BEFORE THE HONORABLE ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE
U. S. Courthouse & Federal Building
231 West Lafayette Boulevard West
Detroit, Michigan 48226
THURSDAY, DECEMBER 4TH, 2008

APPEARANCES:

For the Plaintiffs:	Richard S. Busch, Esq.
For the Defendants:	Kelly M. Klaus, Esq. Daniel D. Quick, Esq.
Court Reporter:	Joan L. Morgan, CSR Official Court Reporter

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1 Detroit, Michigan

2 Thursday, December 4th, 2008

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4 **THE CLERK:** Eight Mile Style, LLC, et. al, versus
5 Apple Computer, Inc, et al., case number 07-13164.

6 **THE COURT:** The first will be defendants' motion
7 for summary judgment.

8 **MR. KLAUS:** Good morning, your Honor.

9 **THE COURT:** Good morning.

10 **MR. KLAUS:** My name is Kelly Klaus. I represent
11 the defendants along with Mr. Quick in the matter.

12 And I think it's important the Court knows there
13 are three motions that are on the calendar for today. One
14 is our defendants' motion for --

15 **THE COURT:** For summary judgment which we're
16 hearing now.

17 **MR. KLAUS:** And the motion has three components to
18 it. One is that the uses of the compositions in question
19 have been expressly authorized through control -- what are
20 called controlled composition clauses in two artist
21 recording agreements --

22 **THE COURT:** Wait a minute.

23 Tell them to move down the hall.

24 **MR. KLAUS:** Thank you, your Honor.

25 The first argument is that the uses in question

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1 have been authorized through what are called controlled
2 composition clauses in artist recording agreements relating
3 to Mr. Mathers who is professionally known as "Eminem."

4 The second argument is that even if the uses were
5 not expressly licensed they've been impliedly licensed as a
6 matter of law by virtue of the fact that the objective
7 manifestation of the defendants in the case, people with
8 the authority to grant licenses have been to grant them.
9 As evidenced most notably by their continuing up through
10 the pendency of this lawsuit as recently as several months
11 ago acceptance and retention of money for the very uses
12 that they challenge.

13 The third argument is an express licence argument
14 that is based on a set of other agreements, other
15 agreements involving Mr. Mathers, involving other co-
16 authors, involving various publishing entities.

17 That third argument is the only one of the three
18 arguments that is effected by the other two motions that
19 are on the calendar today, plaintiffs' motion to exclude
20 and our motion to strike the declarations that have been
21 filed by Mr. Sullivan.

22 Let me start with the express license argument.
23 Your Honor, if I may, I have a -- I know there's been a lot
24 of paper on these motions. I prepared a set of binders --

25 **THE COURT:** Well, I can't -- this is a motion for

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1 summary judgment. We cannot work with a set of binders.
2 Just make the argument, please.

3 **MR. KLAUS:** Okay. The binders only contain
4 evidence that's already been submitted in the record, but
5 if I can go through the individual pieces of evidence.

6 The first one, your Honor, Exhibit 9a which is
7 the 1998 artist record agreement involving Eminem. And
8 this agreement in paragraph 6, and there's also a
9 comparable provision in the 2003 agreement which was also
10 filed as part of the motion for summary judgment states,
11 "All controlled compositions, i.e., songs written or
12 controlled directly or indirectly in whole or in part by
13 F.B.T. artist, any affiliated company of F.B.T. artist, any
14 producer or any affiliated company of any producer will be
15 licensed to Aftermath and its distributors/licensees at a
16 rate equal to," and then it lists the control break, and
17 the balance of the provision deals with a complicated
18 formula that's not relevant to this case about how the
19 royalty rate is to be calculated.

20 The entire argument of the plaintiffs in this
21 case, the entire argument, is that the language that says
22 "will be licensed" can be construed to mean will not be
23 licensed because that is the position unequivocally that's
24 been taken by the plaintiffs in this case in response to
25 this motion is that they have the right not to license for

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1 digital uses. It is our position, your Honor, that is
2 not -- the contract is not in any sense reasonably
3 susceptible to that interpretation. There is no amount of
4 extrinsic evidence and the plaintiffs have cited a lot of
5 extrinsic evidence, testimony of people, exchanges of
6 license agreements, but there is no extrinsic evidence by
7 which the phrase "will be licensed" can be construed to
8 mean exactly the opposite, will not be licensed, can't be
9 done.

10 Under California law which applies to these
11 agreements pursuant to paragraph 21, the law says, if
12 extrinsic evidence is contrary to the plain language, it
13 can't be admitted, the plain language has to govern.
14 That's BMW v New Motor Vehicle Board case which we cite in
15 our papers.

16 So either -- it says either defendant Aftermath
17 has a license for the challenged use or they have to give
18 us a license, but what they can't do is not give us a
19 license. There's no circumstance under which that is a
20 reasonable construction of the phrase "will be licensed."

21 Now, plaintiffs advance in opposition to this
22 argument, four arguments. I want to turn to each one.

23 The first one is that they say this provision,
24 the controlled composition clause, does not apply to
25 digital uses. That is a not a determination of the

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1 contract or a reading of that that is reasonably -- to
2 which it is reasonably susceptible. The same agreement has
3 an ownership provision which is paragraph 8 which deals
4 with the ownership and exploitation of the sound recordings
5 that embody the compositions that are delivered pursuant to
6 the agreement.

7 That section says, Aftermath has the exclusive
8 right to exploit and license or assign exploitations to
9 masters or any derivatives of the masters. Aftermath can
10 exploit them in any manner in records, or any other media
11 or use, and can add to, edit, alter or delete from or re-
12 mix the masters at our sole election. Aftermath and its
13 distributors/licensees shall have the exclusive right to
14 exploit such masters, and this is the key language, your
15 Honor, "in any and all forms of media now known and
16 hereinafter developed," meaning that the agreement was not
17 frozen in time as to the technology that existed in 1998.
18 Finally, it says that exploitation can take place in any
19 form.

20 This is a question that can be answered in terms
21 of whether this contract and this language is reasonably
22 susceptible to construction whereby the compositions -- the
23 controlled composition clauses can modify the digital uses,
24 can and should be answered as a matter of law.

25 The only federal court that has addressed this

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1 issue has agreed that language like this is not reasonably
2 susceptible. The case I would direct your Honor's attention
3 to is the Reinhardt v Wal-Mart case, 547 F. Supp. 2d 346.
4 It's included in what is Exhibit F to plaintiffs'
5 opposition. There is a copy of the Reinhardt case that is
6 printed out from Lexus. In that case like this one, you
7 have plaintiff who claimed to own the composition right who
8 says that the record company which was called Ramone's
9 Production, something called Taco Tunes which is the name
10 of the entity that did the distributions for it. Said that
11 company had exceeded the scope of the license which the
12 plaintiff had granted by allowing Apple, which is the
13 defendant in this case to do exactly what it's doing with
14 the recordings that embody the Eminem compositions, namely,
15 to distribute them in the form of permanent download.

16 In that case the language which is cited at page
17 354 of the Court's opinion says that there is authorization
18 to the record production company to manufacture, advertise,
19 sell, distribute or dispose of the masters and phono
20 records in any and all fields of use by any method now or
21 hereafter known. The same language you find in paragraph 8
22 of the Eminem agreements.

23 In that case what the district court said is, and
24 this is on page 355 of the opinion, "it is not reasonable
25 to construe the phrase all forms now or hereafter known to

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1 exclude defendant's alleged digital download form which now
2 constitutes a form of reproduction." The unambiguous
3 language forecloses other interpretations and the need to
4 consider extrinsic evidence."

5 The second argument that the plaintiffs make in
6 terms of why the controlled composition clause does not
7 apply allows them to say "will be licensed" can mean will
8 not be licensed is that they say there is a requirement of
9 law that a licensed authorizing what's called a digital
10 phono record delivery or a DPD which you've seen a
11 reference to in the papers, they say there is a requirement
12 that be in a separate license, that because the language of
13 paragraph 6 is captioned "mechanical royalty" you need a
14 separate license that is labeled DPD, digital phono record
15 delivery.

16 The problem with that, your Honor, is there's no
17 requirement, there's no such requirement. The statute which
18 deals with compulsory licensing and which creates the term
19 digital phono record delivery is Section 115 of the
20 Copyright Act, Section 115D, Title 17, doesn't say that a
21 DPD license has to be a separate license. The implementing
22 regulations which we've also cited which are Section
23 201.18(a)(6) say explicitly DPDs for purposes of that
24 section are treated as a type of phono record
25 configuration. It's just another form in which the

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1 reproduction is made of a recording that embodies a
2 composition.

3 They say that there is an industry practice that
4 somehow says that always is the case that a DPD license has
5 to be separate and apart from the mechanical license.
6 First of all, the extrinsic evidence that they try to say
7 is industry practice could not vary the language of the
8 agreement which is in paragraph 8 which is exactly what the
9 court in Reinhardt says, you don't look to the extrinsic
10 evidence because there's no circumstances for which it's
11 reasonably susceptible to say that this agreement doesn't
12 cover digital uses.

13 But the more important -- the only thing that
14 they say is evidence of industry practice is a particular
15 license form that's used by one particular publishing
16 agency which is called The Harry Fox Agency. They cite a
17 case, the Rodgers v Hammerstein case referred to in their
18 papers as the "Farm Club" case because that was the name of
19 the digital service. And they say that case, Rodgers &
20 Hammerstein holds the DPD license has to be a separate
21 license. Nothing in the case says that, your Honor. The
22 cases concern exclusively with construing the particular
23 language that was used by The Harry Box Agency.

24 The third argument is they say that Congress had
25 made a judgment that controlled composition clauses

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1 can't --such as you find in the Eminem's recording
2 agreements, can't apply to digital phono record delivery.
3 That's just wrong. The statue doesn't say it. There's no
4 case that says it. There's no legislative history that
5 says it.

6 What they say instead is they cite an embedded
7 provision of Section 115 which is admittedly a complicated
8 and dense statute but which says that with respect to
9 digital phono record delivery in the case where they are
10 covered by a controlled composition -- it says where you
11 have a controlled composition clause -- remember one of the
12 things I said earlier was that part of what the -- what the
13 controlled composition clause does is, it says "will be
14 licensed" and then it goes on to provide a lengthy formula
15 about the rate. And what the controlled composition clause
16 has done in addition to granting the right to use the
17 composition that's on the sound recording that the record
18 company is paying is they say there is a rate that is fixed
19 by statute for composition. This is the so-called
20 compulsory or the mechanical rate. It's established
21 through a whole proceeding in Washington with the Copyright
22 Royalty Board that comes up with the rate.

23 What controlled composition clauses do is they
24 say for purposes of our agreement we'll get the right to
25 use them and we'll pay you at some percentage that is less

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1 than the statutory rate. That's where most of the
2 negotiation is in the text cited in record industries how
3 far off that's going to be.

4 And what Congress said in Section 115(c)(3)(E)(I)
5 was that with respect to agreements that have controlled
6 composition clauses the rates that were fixed, so-called
7 statutory rates, would be applied, and the key language is
8 "in lieu of" the rates that are found in those provisions.

9 It doesn't say those provisions are ineffective.
10 It doesn't say the rights granted pursuant to those
11 provisions can't apply to digital phono record deliveries.
12 It says that the rate that is fixed which is called the
13 statutory rate will be applied in lieu of that. That's all
14 the legislative history says that they cite. And there is
15 no case that ever held and there would be an unreasonable
16 construction of the statute to say that it wipes away
17 controlled composition clauses in the case of digital phono
18 record delivery.

19 The very fact that Congress said we recognize
20 that there will be controlled composition clauses that
21 apply to digital phono record deliveries indicates that
22 Congress did not intend to create those clauses.

23 Four, the final argument as to why the controlled
24 composition provision doesn't apply. If they say that the
25 language which is Aftermath and its distributors/licensees,

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1 they say that distributors/licensees have to mean the
2 distributor/licensee is affiliated. And the problem is
3 there's nothing in the contract, there's nothing in any
4 practice, there's nothing in any statute, there's nothing
5 in any case that says this language has to be read to mean
6 that the distributor or licensee has to be affiliated.

7 What they've done is they've said in their papers
8 that Universal witnesses, Universal is the principal owner
9 of the Aftermath Record Company. What they said is that
10 Universal witnesses conceded at their depositions that when
11 a distributor or a licensee is unaffiliated with the
12 company they have to go and get their own license and the
13 mechanical. That's not what the witnesses said.

14 What the witnesses said is that in one
15 circumstance which is where the record company takes one
16 song that it has and said to somebody else we're going to
17 give you what's a license for a compilation album meaning
18 we are Universal, we have this collection of recordings.
19 You overhear, let's say, you don't own these recordings but
20 what you would like to do if you would like to put out an
21 album that is not an album, an Eminem album, but let's say
22 the greatest hip hop hits of the year 2002, and you want to
23 borrow one from me, and you want to borrow one from
24 somebody else, you want to borrow one from somebody, and
25 it's going to be your album and you're going to put it out.

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1 In that case of the compilation licensee, it is indeed the
2 practice that the compilation licensee is required to clear
3 mechanical, is required to pay the publishers for the right
4 to use the composition. There's very good reason for that.
5 It's their product. It's the other record company's
6 product and the one record company doesn't want to deal
7 with having to find the publishers and pay them. That
8 doesn't mean that -- it doesn't mean that the language
9 could be construed to say that all cases if the
10 distributor/licensee is not affiliated or owned by you,
11 there's requirement that they have to go out and deal with
12 the owner of the composition rights exclusively. Nothing.
13 No case says that. Indeed, the Reinhardt case stands for
14 exactly the opposite proposition.

15 In sum, your Honor, we think that it is clear
16 that the language of the implied license -- the language of
17 the controlled composition clauses clears an express
18 license. There's nothing -- the contract is not reasonably
19 susceptible for contrary interpretation. And we think that
20 covers -- that should entitle the defendants to summary
21 judgment on the entire case.

22 The second argument -- unless the Court has any
23 questions on the controlled composition clause.

24 **THE COURT:** Go ahead.

25 **MR. KLAUS:** Second argument which is the implied

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1 license argument which is -- the cases are clear that even
2 if a license has not been created by a writing, a license
3 can be created by conduct. It can be created by a work
4 being turned over to the defendant with the intent that the
5 defendant distributed it, and some objective manifestation
6 of that. And what the cases -- and there are several cases
7 which we've cited in our papers. There's the Effects
8 Associates case from the Ninth Circuit. There's the I.A.E.
9 case from the Seventh Circuit. There's the Johnson v Jones
10 case from the Sixth Circuit.

11 What those cases say is that the number one
12 factor in terms of determining whether or not the plaintiff
13 implied a license, is not when the plaintiff comes into
14 court and says I never intended for that to be done, I
15 never wanted them to do that because that sort of
16 subjective manifestation is always subject to after the
17 fact revision. What the cases say is the single most
18 important factor is the objective manifestation by taking
19 money and by keeping it. And here, there is no doubt
20 that's exactly what's happened with respect to all the
21 challenged uses.

22 As of the end of the fourth quarter of 2007 as is
23 set forth in the Linda LeMoine declaration filed with the
24 motion, we know that more \$640,000 has been paid to the
25 plaintiffs for the digital uses.

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1 We now have what we've resubmitted as Exhibit P
2 of Ms. LeMoine's declaration in the replied brief in
3 support of the motion. The most recent royalty check that
4 they have covering exactly the uses that they didn't intend
5 to cover. That check is dated August 6th, 2008.

6 The only response that they have on the implied
7 license argument, your Honor, is it was too difficult for
8 us to understand or read the royalty statement to know what
9 was being covered, and it was too difficult for us to go
10 and figure out what money we should have had to give back
11 to you. But the reality is, your Honor, they've never once
12 said including as recently as August of this year, they've
13 never once said that what you should do is -- they never
14 said, we don't approve of the digital uses, we know you're
15 making them, cut us a new check, leave those out. They've
16 never said it. They took the money and under the case law,
17 your Honor, we think that clearly creates a license.

18 Third argument, your Honor, which is the other
19 agreements that are in the case. I will touch on those
20 briefly. They are summarized in a chart that we have
21 submitted along with our motions. That is Exhibit 22H to
22 the reply brief that was filed on October 15, Ms. LeMoine's
23 declaration. It goes through one by one, composition by
24 composition. I point the Court to what agreements, perhaps
25 the license of the 1998, the 2003, the sound track

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1 agreement for the movie "Eight Mile" which covers the
2 compositions, an agreement between a company that's called
3 Shade Records which is owned by Mr. Mathers and his lawyer
4 Mr. Rosenberg, and that distributes his work through
5 Interscope Records and Aftermath also related to the
6 defendants.

7 It also points where the mechanical licenses are.
8 Then the chart was updated, your Honor -- the chart was
9 updated on the mechanical licenses to make clear that there
10 are -- there are mechanical licenses that covered some of
11 these compositions that have been granted by a company
12 called Ensign or Famous Music which we found out had the
13 right to do that when the plaintiffs produced to us on
14 August 28th, a copy of an agreement which showed that they
15 had what's called a co-publishing agreement with Ensign and
16 therefore the mechanical licenses that we have from Ensign
17 were covered.

18 I don't want to go through that. The only point
19 that I will make about the -- something I want to make
20 about these agreements, two-fold. One is there is no
21 dispute that the language of the -- a number of these have
22 their own controlled composition clauses. The plaintiffs
23 do not have the argument that they try to make with respect
24 to the Eminem agreements of 1998 and 2003 that talk about
25 the language which said "will be licensed." And so "will

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1 be licensed" means there has to be a license in the future.
2 What they say is they are hereby licenced. They don't have
3 that argument, number one.

4 Number two, they say that the other authors have
5 no right to distribute -- the other authors have no right
6 to grant any of these licenses because they're subject to
7 their own publishing agreements which create restrictions.

8 But there are two problems with that. First of
9 all, there is no evidence of what those other agreements
10 are with respect to the other co-authors.

11 What you have instead is Mr. Martin who is the
12 principal of Martin Affiliated, and he's the manager of
13 Eight Mile Style, the main representative of the plaintiffs
14 in this case, says in paragraph 15 of his declaration in
15 opposition to the summary judgment motion, your Honor, he
16 says, "I am familiar with the fact that states that these
17 co-authors have agreements with other companies, but I'm
18 confident that those agreements contain restrictions."
19 Doesn't say that he knows, doesn't say that they've seen
20 any of those agreements with the other publishers. There's
21 no evidence that they do.

22 But the second and more important point, your
23 Honor, is that there's no evidence that the defendant,
24 Aftermath Records, which obtained the licenses from these
25 other co-authors, had any notice that there was a

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1 restriction on the part of any of these other entities to
2 grant the licenses.

3 The law is clear, we've got the citations in our
4 brief, and without the notice they're like any other party
5 that can rely on somebody who said -- as Eminem in the 1998
6 agreement and the 2003, that he has the right to grant the
7 licenses.

8 Those are the -- I believe those are the points
9 with respect to the three arguments that are in the motion,
10 your Honor. I'm happy to -- I understand there's a lot of
11 paper. I'm happy to address any questions that you may
12 have.

13 **THE COURT:** What about all the other claims in the
14 complaint, tortious interference?

15 **MR. KLAUS:** Oh, I'm sorry. The --

16 **THE COURT:** Consumer Protection Act, all of that.

17 **MR. KLAUS:** I think our papers were not clear on
18 that, and I apologize, your Honor. We filed a stipulation
19 I believe in April or May where plaintiffs dismissed the
20 other claims. So they're not in -- there's -- I'm sorry it
21 wasn't clear. There's only the --

22 **THE COURT:** The only claim is copyright
23 infringement.

24 **MR. KLAUS:** That's correct, your Honor.

25 **THE COURT:** Okay.

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1 **MR. KLAUS:** It made -- striking those other claims
2 out it made writing the motion somewhat easier.

3 **THE COURT:** Good.

4 You'll have rebuttal.

5 **MR. KLAUS:** Thank you, very much, your Honor.

6 **MR. BUSCH:** Good morning, your Honor.

7 Richard Busch, on behalf of the plaintiffs.

8 Your Honor, Mr. Klaus' argument arises from one
9 very flawed premise, and the flawed premise from which it
10 arises is that Aftermath and Apple had a license by virtue
11 of the mechanical royalties section in the 1998 and 2003
12 agreement. That is the premise upon which his argument is
13 based, and that premise because of its flaw destroys his
14 entire argument.

15 I just want to briefly address the point -- or
16 some of the points that Mr. Klaus made and then I will
17 respond to the other points in the summary judgment motion.

18 First, Mr. Klaus begins by saying that this
19 agreement in 1998 and 2003 between F.B.T. which is an owner
20 of the master recordings and Aftermath which has in it what
21 he calls a controlled composition clause but which in
22 effect the mechanical royalties section states all
23 controlled compositions will be licensed to Aftermath and
24 its distributors like these at a certain rate. It is not a
25 license by its own terms. It simply provides for a reduced

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1 rate when eventually a license may be signed. But for
2 purposes of copyright infringement one has to remember
3 this: You have to have the license from a publisher in
4 order to reproduce a musical composition.

5 Mr. Klaus says that we are reading that language
6 to say just the contrary, that we will not license the
7 composition. That is absolutely false and a
8 misrepresentation of our argument in this case.

9 With respect to physical products, we have always
10 negotiated the terms of separate licenses with Aftermath
11 and entered into those agreements. They are separate
12 agreements. You cannot, you cannot simply say, well, we
13 think you have an obligation to enter into a license so
14 we're going to commit copyright infringement. You can't do
15 it. You have to have the license, and we always enter into
16 a license when negotiated with respect to the compositions
17 that are at issue in this case.

18 But Mr. Klaus said something else in his argument
19 on his express license point, he says either Aftermath has
20 the license or -- this is a quote, "they have a right to a
21 license." But even if Aftermath believed they had a right
22 to a license with respect to composition, that does not
23 transform itself into a license that gives them a right to
24 exploit musical composition. It just doesn't do it, and
25 that's a fundamental flaw in his argument.

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1 He also says that the -- and this is every
2 important -- he also says the agreement -- now remember the
3 agreement that he's referencing, the 1998 and the 2003
4 agreement, is between -- and this is very important, it's
5 not between the plaintiffs in this case and Aftermath, it
6 is between separate parties. It's between a company called
7 F.B.T. Productions that own the master recordings and
8 Eminem and Aftermath.

9 There are two separate rights in copyright. This
10 is very important. There is a right to master recordings,
11 there's a copyright to master recordings, and there is a
12 separate copyright in a musical composition.

13 The second point on the exploitation or this
14 supposed express license that they claim the 1998 and 2003
15 agreement gives them is the language about the right to
16 exploit master recordings. Those are not compositions,
17 master recordings. He says, well, under the agreement
18 F.B.T. gave them the right to exploit master recordings in
19 all forms of media now known hereinafter created. That's
20 correct. We're not disputing that. But you know what the
21 problem is, and the problem with his entire argument is
22 he's trying to take a contract that was drafted in a way
23 that does not provide them the right they're claiming
24 herein and they are trying to say, well, we didn't draft it
25 right, we don't have the right but we're going to try to

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1 fanagle them and put a square peg into a round hole.

2 If you look at the mechanical royalties section
3 which is the right -- which is the section that we're
4 talking about here, there is no reference to record -- the
5 right to exploit records or master recordings, the
6 compositions in records or master recordings as that term
7 is defined in the master recordings section. In other
8 words, there's no tying the two together. So you have to
9 have the right to exploit the master recordings, but when
10 you go back to the mechanical royalty section and you look
11 at what it says, there's -- they could have said, you
12 hereby license to us the musical compositions to exploit in
13 records as that term is defined later. They could have
14 said that.

15 In fact, in the other, quote, unquote, third-part
16 agreement that they entered into and they submitted to this
17 Court, they did that. They know how to draft a contract
18 that does what they want it to do. They just didn't do it
19 here. And they have to live with the contract as it's
20 drafted here.

21 The other point -- well, that's -- well, the
22 other point that he made -- well, those are two points on
23 the direct license. So I want to go back now for a second
24 and I want to go through -- and rather than continue to
25 address his points, I want to go back to points that I now

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1 want to make with respect to the first issue in the case
2 which is: Does the 1998 or 2003 agreement that's referenced
3 in this case, does that grant an express license?

4 Before I do, your Honor, I think it's important
5 to say what this case is about. The plaintiffs in this
6 case are Eight Mile Style and Martin Affiliated. They are
7 Detroit publishers and they are responsible for accounting
8 to their writers, Eminem, Marshall Mathers, Louie Resto,
9 and the Bass Brothers, Mark and Jeff Bass. They have a
10 duty, they have an obligation to writers to ensure they are
11 being accounted to accurately from third parties, and that
12 there's transparency in the accounting. That is what this
13 case is all about, your Honor, that's what this case is all
14 about.

15 A few fundamentals along those lines. The
16 Copyright Act gives a music publisher the exclusive right
17 to license his compositions for the manufacture and
18 distribution of records. They have the exclusive right to
19 do so. A party reproducing product, that's Apple.
20 Remember, Apple's the defendant in this case. Aftermath
21 intervened. Apple was the party that was sued. A party
22 reproducing product must have a valid license from a music
23 publisher in order to lawfully reproduce a musical
24 composition. They have to have it. If they don't have
25 that license or it's not valid, they are liable for

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1 copyright infringement.

2 Because it's the party reproducing and
3 manufacturing composition, that maintained the sale
4 records, Apple, I-Tunes, the biggest reproducer of musical
5 compositions today, in the world, by virtue of their I-Tune
6 store, they keep all accounting records. They know the
7 sales. And then it's the same way, for example, with the
8 parties who are releasing records. That's why we get
9 licenses for the party that's reproducing records, the
10 party that's reproducing because they are the ones that are
11 the keeping the accounting records and in order to know
12 whether their accounting records are accurate, you have to
13 have a direct relationship with them, and that's why in the
14 industry you enter into those licenses directly with those
15 parties.

16 So the only way a music publisher can have
17 transparency in accounting and an account -- and fulfills
18 its duty to its writers is to have a direct license with
19 the party reproducing the compositions which would give
20 them audit and accounting rights.

21 This is what Eight Mile was entitled to and is
22 seeking in this action. There is no -- and you can't, you
23 cannot say or Aftermath cannot say that they could take
24 some language from an agreement that's not a license and
25 somehow extrapolate that it is. You can't do it. And

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1 because Apple -- they don't have a license, Apple is liable
2 for infringement, and if they want to cure it, they need to
3 get a license from Eight Mile.

4 Okay, your Honor, some points on the express
5 license as a matter of the law on this issue. This
6 contract was governed by California law, the 1998 and 2003
7 agreement. And what the law in California says is that a
8 trial court must provisionally receive any proper extrinsic
9 evidence which is relevant to show whether the contract is
10 reasonably susceptible of a particular meaning. It's
11 reversible error to refuse to do so based on the court's
12 conclusion that the language in the contract is clear and
13 unambiguous on its face. That's Morrey v Vannucci, 64 Cal.
14 App.4th 904. In determining what the meaning of the
15 language is the court is look at the subsequent conduct of
16 the parties.

17 First of all, in our view directly contrary to
18 Mr. Klaus' view, the language of the agreement is, in fact,
19 clear. There is no license. You cannot read language to
20 say that F.B.T. and its affiliated real license to
21 Aftermath and its distributors/licensees as a license
22 itself. All they're saying is that we will license to
23 Aftermath and its distributors/licensees at a certain rate,
24 at a reduced rate. I'm going to get to that in a minute
25 when I get to the point about why it doesn't apply to

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1 digital downloads, and we'll get to that in a minute. But
2 you cannot take that language and say that's a license,
3 it's just not. It doesn't have any of the indicia of a
4 license, it doesn't say it's a license, it doesn't have any
5 audit rights, it doesn't have any accounting rights, it
6 doesn't have any payment terms, it has nothing that you
7 would find in a license. So we believe it's clear that it's
8 not a license. That's point number one.

9 It's not self-effectuating. It doesn't have --
10 Mr. Klaus points out they submitted to this Court after
11 discovery closed thousands of pages of agreements,
12 recording agreements. Those recording agreements say in
13 what they would call controlled composition clause that the
14 compositions are quote, unquote, hereby licensed. And in
15 many cases say for digital.

16 They know how to draft it right. They didn't
17 draft it right here such as they want and they have to live
18 with their contract that they drafted.

19 As I said, it omits material terms in a license,
20 audit rights, accounting rights, things of that nature, and
21 they contemplate the parties will thereafter do something,
22 but it's not a license.

23 Now, even though we think it's clear that it's
24 not a license the extrinsic evidence is overwhelming in
25 this case that the parties both understood that you had to

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1 negotiate a separate license for digital downloads. And it
2 may be putting the cart before the horse, your Honor, but I
3 do want to say one thing.

4 Mr. Klaus, again, misrepresents our argument when
5 it comes to digital downloads, okay. When it comes to
6 digital downloads, what the law says is you cannot have
7 reduced rates, you cannot have caps. The caps are what
8 record companies will do is say you might release 12 songs
9 on an album, we're only to pay for nine or ten, okay,
10 that's what a cap is. And the Copyright Act says you can't
11 have reduced rates and you can't have caps.

12 Why do we say it doesn't apply to digital
13 downloads to this contract, this contract report, because
14 it's not a license -- because it's not a license by its own
15 terms and because the only purpose of it to do two things:
16 reduce the rate and put on caps. Since you can't have
17 reduced rates and caps, it's toothless. That mechanical
18 royalties section is absolutely toothless and cannot apply
19 to permanent downloads, period. It would be -- it's a
20 educational exercise perhaps to say what if it did this,
21 and what if it did that, and what if the language was
22 different were to apply to digital downloads, but guess
23 what, it doesn't. And you have to live with the contract
24 you have, and so this mechanical royalties section is
25 absolutely ineffective as it applies to permanent

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1 downloads.

2 But -- let's talk about the extrinsic evidence to
3 make it clear that even Aftermath knows that to be the
4 case. First, in 2001, Aftermath sent a letter to Eight
5 Mile -- or Universal does to Eight Mile and to others
6 saying they're going to start making songs available for
7 digital downloads and they quote, unquote, hope that Eight
8 Mile will sign a license. There would be no need for a
9 hope of them signing a license if, in fact, the permanent
10 downloads were covered by the mechanical royalties section.

11 Secondly, and perhaps even more importantly, is
12 what happened in 2002. The song, "Lose Yourself" is one of
13 Eminem's biggest songs. It was featured prominently in the
14 "Eight Mile" movie. The defendants contacted Mr. Martin
15 and asked to enter into a permanent download license for
16 the song "Lose Yourself."

17 Now, if they had the right, if they had the right
18 under the mechanical royalties section to make it available
19 without a license, why would they have contacted Mr. Martin
20 to do so? But even more importantly, the two sides
21 negotiated terms. One of the terms was a two-year term.
22 If you had a right to enter into a -- make "Lose Yourself"
23 available for permanent downloads under this mechanical
24 royalties section, why would you enter into a digital
25 download license with a two-year term? It makes no sense.

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1 There were many other terms that were negotiated. There
2 was no reason to do so if, in fact, you had that right.

3 Thereafter -- and let me back up one second. Mr.
4 Martin agreed to the "Lose Yourself" license. It was never
5 returned executed by the defendants, but Mr. Martin agreed
6 to the terms. He thought there was an agreement on the
7 terms. He thought there was an agreement on the terms, and
8 believed he was being paid for "Lose Yourself" thereafter.

9 So -- and in this case by the way, Universal to
10 the every end of discovery never admitted there was an
11 agreement, but ultimately at the end of discovery claims
12 that there was.

13 Thereafter, Universal sent multiple requests for
14 digital download licenses with the same terms that had been
15 negotiated on "Lose Yourself" license for digital
16 downloads, Mr. Martin said, no, I'm not doing it, "Lose
17 Yourself" was a one-time thing we negotiated. We
18 specifically said it would be a trial because digital
19 downloads were new, he didn't know about accounting, he
20 didn't know whether it would satisfy the need for
21 transparency, he didn't know any of those things we
22 negotiated. The "Lose Yourself" license was very early in
23 the permanent download process, and the people from
24 Universal who were involved in those negotiations all said
25 they understood that this was a trial or at least Patricia

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1 Blair said -- who was the person who negotiated it, she
2 remembered that there was a discussion, it was a trial
3 matter, and everyone said, Tim Hernandez submitted an
4 affidavit. He was in the department at the time. Chad
5 Gary, still in the department. Pat Blair was deposed.
6 They all said that they knew that Mr. Martin back then
7 objected to any of these compositions being exploited for
8 permanent downloads. They were all aware of his
9 objections. It was only "Lose Yourself" that was
10 negotiated on a trial basis and everyone back then knew of
11 the objections. This was not a concocted after the fact
12 objection. All the way back in 2002-2003 -- we submitted
13 Tim Hernandez's declaration. Tim Hernandez was in the
14 legal -- the business and legal affairs department at
15 Universal at the time. We submitted his declaration in
16 this case that everyone in the department was aware of
17 those objections. Ms. Blair testified that people were
18 aware of the objections, okay. So this is not a concocted
19 after the fact thing. These objections were well known and
20 Mr. Martin testified on making the objections over and over
21 and over again.

22 Next point, two people have testified in this
23 case about this. Universal has a practice where they have
24 a mechanical royalty or controlled composition clause in
25 their contract. If it's ambiguous and they don't think

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1 that it might give rights that -- if they're not sure
2 whether rights are granted or not they will send out
3 requests for licenses. If they feel confident that a
4 controlled composition or mechanical rights clause gives
5 them certain rights, they will send out an advice letter.

6 Mr. Leo Ferrante testified to that in his deposition
7 that he understood that to be the practice. He was with
8 Universal's copyright department. And between the time of
9 our summary judgment filing and today, Peter Paterno who
10 was their expert, testified that he understood that to be
11 the practice, too. Well, guess what? We never once got an
12 advice letter from Universal. They sent requests for
13 licenses because they know that the mechanical royalties
14 section is not a self-effectuated controlled composition
15 clause for either physical or for digital.

16 Next point on this extrinsic evidence, Universal
17 sent licenses to -- license requests to Eight Mile and Mr.
18 Martin for both physical and digital requests. We put this
19 in our papers. They would not have done so had they
20 thought that even for physical that the mechanical
21 royalties section would self-effectuate. Mr. Martin sent
22 back his own licenses only for physical. He took out the
23 reference to digital every single time. Again, consistent
24 with all of his objections he had been making since 2002,
25 about not making these songs available for digital

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1 download.

2 Lastly on extrinsic evidence, and I think most
3 damning to Universal, so "Lose Yourself" -- and the one
4 negotiated digital download with respect to "Lose
5 Yourself." Universal never returned it, never executed it
6 and returned it. In this litigation we asked them did you
7 approve this, was this approved back in 2002, was this a
8 license for digital download that had been agreed to by
9 Universal? We got -- we couldn't get a straight answer.

10 At the very end of discovery -- it might have
11 been after discovery closed, I finally got a letter from
12 Mr. Klaus saying Universal will stipulate that they did
13 negotiate and agreed to the terms for "Lose Yourself"
14 license back in 2002.

15 What did we do? We -- because it was a two-year
16 term, with a right to terminate, the plaintiffs terminated
17 the license, terminated it for "Lose Yourself."

18 What did Universal do in response? Did they say,
19 well, you know what, we don't need a license we have the
20 mechanical royalties section. No. They sent out, and this
21 is in our papers, they sent out a notice of compulsory
22 licensing meaning that they were going to exercise from the
23 Copyright Act imposing the right to enter into a compulsory
24 license for "Lose Yourself."

25 Now, we don't need to get into it right now

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1 whether that compulsory license is or was not effected, but
2 it certainly is an admission by Universal that they know
3 that they can't rely on the mechanical royalties section
4 and that they would have to have a separate license since
5 they terminated the "Lose Yourself" license once they
6 admitted that it was effective. The fact that they went
7 ahead and issued compulsory licenses certainly is an
8 admission that they know that mechanical royalties section
9 does them no good, no good.

10 So, your Honor, this is a summary judgment and
11 there only has to be a genuine issue of material fact for
12 the Court to deny summary judgment. The language of the
13 agreement we think actually favors us, but even if it's
14 ambiguous all of the extrinsic evidence in the case
15 supports the notion that everyone understood that that
16 mechanical royalties section is not an express license.

17 Now, I want to address one other thing in that
18 regard before I get to the next point that's important
19 which is this notion of the language of Aftermath and its
20 distributors/licensees that F.B.T. and its affiliates will
21 license to Aftermath and its distributors/licensees, and
22 I'll get to that issue in a second.

23 Mr. Klaus interprets it one way. He says --
24 first of all, he misinterprets it to be a license. But
25 there is a very interesting way one can interpret that

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1 also. The interesting way one can interpret it is to say
2 that under that agreement that the parties recognize that
3 F.B.T.'s affiliates have the right to enter into a license
4 later with Aftermath's licensee. And since Apple is
5 Aftermath's licensee, purported licensee, we should have
6 the right to enter into a license separately with Apple.
7 So that's a separate issue but it's certainly another way
8 that one can interpret that language.

9 The next point which I've covered -- oh, I want
10 to also address the Reinhardt case since Mr. Klaus
11 mentioned that case. The Reinhardt case is completely
12 distinguishable and not on point because, again, you have
13 to live with the contract we have in this case. And in the
14 Reinhardt case the songwriter authorized his publisher to
15 license a song to issue and the publisher granted a license
16 to the defendants for "to electronically distribute and
17 duplicate non-physical digital copies." That was
18 specifically the grant of right in that contract.

19 Here, when it comes to a composition, there is no
20 similar language as it relates to musical compositions. I
21 wanted to make that point as well.

22 Okay, with regard to the mechanical royalties
23 provision not applying to digitals which Mr. Klaus -- this
24 is our next point. I believe I addressed that a few
25 moments ago by saying that our point there -- our primary

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1 point there is that because this language in this contract
2 says that we will license for a reduced rate and for
3 certain caps, and because as a matter of law you can't do
4 that for digital, there's no application for digital in
5 this contract. It would be as I said an academic exercise
6 to go through and say well what if this, and what if the
7 language said this, and what if the language said that. It
8 just doesn't say it here.

9 And we do submit the custom and practice in the
10 industry through Mr. Sullivan that all these record labels
11 in fact do license compositions for digital downloads
12 separately.

13 Okay, let's see here. Let's go to the implied
14 license, I think that's the next argument that Mr. Klaus
15 raised. The Sixth Circuit has made it very clear that
16 there are several elements to find an implied license.
17 There must be a request for the creation, a creation and
18 delivery and an intent that the license be copied and
19 distributed in the manner in which it was distributed. The
20 Sixth Circuit has said and this is from the Johnson v Jones
21 case, the most important element of an implied license is a
22 finding that the "copyright owners intended that their
23 copyrighted works be used in the manner in which they were
24 eventually used. Without intent, there can be no license."

25 Well, here, your Honor, as I said all of the

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1 evidence -- there is uncontradicted evidence in this record
2 that Joel Martin for Eight Mile objected and objected and
3 objected and objected and that from 2002 onward he made it
4 very clear he did not want his composition licensed for
5 digital download because there was no transparency in the
6 accounting, because he couldn't be sure that -- using the
7 account directly and he wanted a direct relationship with
8 Apple.

9 And, in fact, the party from Universal said that
10 the one license, "Lose Yourself" license that was entered
11 into, this lawyer said she remembered there was something
12 about it being a trial license to see how things went. So
13 there were objections and Mr. Martin has testified to the
14 objections, people from staff who have dealings with
15 Universal testified in this case about the objections, and
16 Tim Hernandez said it was well known so there was no
17 consent to any of this.

18 Now, let's get to the main point that Mr. Klaus
19 makes. The main point that Mr. Klaus makes in connection
20 with this argument is that Eight Mile cashed checks, okay.
21 True, Eight Mile did cash checks. But -- and this is the
22 important but -- several things. One, Universal sends one
23 check as part of its accounting. It contains 95 percent if
24 not more of physical product sales, 95 percent if not more.

25 Secondly, remember what -- I mentioned this,

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1 there was a digital agreement entered into for Master
2 Tones, which is when your phone rings and it might play a
3 song or something, or two seconds of a song. In 2004, I
4 believe there was an agreement entered into between Eight
5 Mile and Universal for Master Tones. And then there was
6 the "Lose Yourself" license that Eight Mile expected to be
7 receiving money for. So when Eight Mile gets these
8 statements all it says is "other," list "other." Doesn't
9 break it out by phone and Universal -- as far as Eight Mile
10 is concerned they believe that what they're getting is
11 money for the physical product as well as for the "Lose
12 Yourself," as well as for the Master Tone. There is no
13 knowing acceptance of money with respect to these other
14 compositions and Universal lists on their accounting sheet
15 "other," and "digital." So the digital could be for the
16 Master Tones, could be songs for license for Master Tones.
17 It doesn't break it down by permanent download. It doesn't
18 say -- it certainly doesn't say Apple. It doesn't say
19 permanent download. It says "other" and it says "digital."
20 And because Universal and Eight Mile entered into an
21 agreement, entered into it again for Master Tones, the
22 digital would fall under Master Tones, and 95 percent of it
23 was physical.

24 And so the point is this: Knowing the objections
25 of Eight Mile, knowing they objected to their songs being

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1 licensed for permanent download, knowing they wanted a
2 direct relationship with Apple, an unscrupulous defendant
3 who knew that they would be perhaps guilty of copyright
4 infringement could not -- I'm not suggesting that Universal
5 is unscrupulous in this regard, but if they wanted to
6 simply camlouflage money with other money, send one check
7 to a publisher who has the duty to account to his writers
8 and pay writers who are hungry, who need money, who expect
9 to get paid, and say, oh, you cashed that check. We didn't
10 tell you that there were permanent download sales for this
11 song or that song or this song, we just put it as "other"
12 or "digital" so you didn't know, but now you've ended up
13 with an implied license. There certainly is a question of
14 fact on this issue.

15 Okay, the "Farm Club" case I think, your Honor,
16 is particularly instructive in this case because the
17 relevance to the "Farm Club" case is that Universal tried
18 to do the same thing they're trying to do here. They're
19 trying to take a license that doesn't provide certain
20 rights. In the "Farm Club" case, they tried to take a
21 license that didn't provide certain rights and use it for
22 digital and the court said, no, you've got -- licenses are
23 narrowly construed and you've got to live with what the
24 language says.

25 Here, there's not even a license. There's not

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1 even a license, but the same theory applies. They have to
2 live with the language in the agreement that they drafted,
3 and as the drafter all inferences are against them.

4 I'd like to talk I guess lastly about the
5 plaintiffs' motion to -- well, it's not our motion to
6 exclude late-produced documents, it's the late-produced
7 documents, the third-party agreements that Mr. Klaus made
8 reference to in the last part of his argument.

9 He made reference to a chart they supplied.
10 First of all, it's really -- it's unbelievable quite
11 frankly. Mr. Klaus says we have these third-party
12 recording agreements, these third-party documents, and
13 while plaintiffs say that these artists might not have had
14 the rights to grant licenses, there's no evidence of it.
15 And he says well they might, Universal might not have --
16 they might have known -- he said they might have known, or
17 they should have known that these artists didn't have any
18 right, there's no evidence of it.

19 Every one of these documents were produced after
20 the close of discovery, every one of them. And so -- and
21 many of them, many of them produced with their summary
22 judgment motion for the first time. So certainly
23 plaintiffs should not be prejudiced by the fact that
24 documents just produced, there's no evidence to rebut -- or
25 to discuss whether, in fact, these artists did or did not

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1 have certain rights, or what Universal's knowledge was, we
2 would need to take the depositions of all those people. We
3 would need document requests. We would need their
4 agreements with their administrators. We would need to
5 depose different people from Universal. They say, well,
6 you could have just asked for a Universal deposition. It
7 wouldn't have been just one person. We would have had to
8 depose individuals, their administrators. We would need
9 documents. There would be no way to address that point.
10 But even with all that said, the agreements themselves as
11 set forth in our chart that we submitted show that with
12 respect to many of the songs there's no license for
13 digital. So we have in Exhibit 2, the Patrick Sullivan's
14 declaration, we have broken down by sections the different
15 documents that were produced. The first section is
16 purported license agreements that make no mention of DPDs.
17 And licenses are narrowly construed that if there's no
18 mention of a DPD as an exploitation they don't have digital
19 download license.

20 Section 2 of Exhibit 2 has certain documents from
21 the Harry Fox Agency, certain licenses, certain
22 percentages. And then we have a --

23 **THE COURT:** I have Exhibit 2.

24 **MR. BUSCH:** Okay. Anyway, the document -- you
25 have it there. Those are -- well, that that's argument.

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1 I think that's all that I have, your Honor,
2 unless your Honor has any questions.

3 **THE COURT:** No questions.

4 Rebuttal?

5 **MR. KLAUS:** Thank you, your Honor. I will try to
6 be brief.

7 First, I want to start with the implied license
8 argument that -- Mr. Busch said we get one check, how are
9 we to know if there's income that there's for permanent
10 downloads that are being made other than for "Lose
11 Yourself." Well, that argument is based on statements that
12 were said in 2002, 2003. It doesn't explain why a year
13 after filing the lawsuit, they're still getting the check
14 that includes the money for it and they're still cashing
15 it. And, again, it's not that they're saying -- it's not
16 that they're saying it's a hassle to go through for them
17 and say, well, I figured it out that this particular line
18 doesn't count for it so I'm going to have to cut a check
19 and send it back to you. They could say, send me a check
20 that doesn't include those uses. I don't want to take your
21 money for it, and they've never asked for it. What the
22 evidence shows is that they continued to deposit the check.

23 I would also like to point out, Mr. Busch said
24 how are we to know, how are we to know because it said
25 "other"? Well, the statements that were said in 2002 and

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1 2003 did say "other." The more recent statements over the
2 last couple of years as indicated in the exhibit to Ms.
3 LeMoine's declaration, first of all, there's no mistake
4 whether it's "Lose Yourself" or some other composition,
5 they list all the compositions, they break them out
6 individually, and they say in "sales type" they don't say
7 "other" they say DNLD, download. And at the same time
8 by -- I would also point out there's an exhibit that was
9 submitted by Mr. Busch on behalf of the same plaintiffs in
10 the F.B.T. and Em2M capacity which shows artist royalty
11 statements, the payments for the sound recording as oppose
12 to the composition, sent to exactly the same person, Mr.
13 Martin, at exactly the same address, for exactly the same
14 compositions that say permanent download. It's just not
15 plausible for them to say they didn't know they weren't
16 getting them. And the bottom line is it doesn't matter
17 because they've been on notice of this at least since
18 they've filed their lawsuit, and they still cashed the
19 check.

20 And what was important in the Johnson v Jones
21 case, your Honor, was there was no payment of money.
22 Didn't take any money, didn't deposit it in the bank.

23 And the other case, Effects Associates, what it
24 stands for is the proposition that the best evidence of the
25 objective intent is if somebody takes the money and cashes

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1 it at the bank.

2 Let me respond to a couple of other points. Mr.
3 Busch said I mischaracterized his argument in terms of
4 saying will, will not. What he said is they came to us and
5 we always agreed to give them something that was physical.
6 What I said was his argument is "will" can mean will not in
7 the case of digital and he didn't deny that, he didn't deny
8 that. That is the essence of their argument. All the
9 extrinsic evidence about agreements that are being sent to
10 Mr. Martin and licenses, their argument depends on the fact
11 that it is within their right under the contract not to
12 grant a license, that "will" can mean we will not for those
13 uses.

14 There was a reference to -- there was a reference by
15 Mr. Busch, the statement that the 1998 agreement involved a
16 different company, F.B.T. I think the suggestion was that
17 doesn't bind Eight Mile. That's not true. It's F.B.T. or
18 its affiliates. In fact, Mr. Martin at his deposition,
19 this was Exhibit 8(b), pages 320 to 322, even said, I
20 understand this has to apply to us because of the -- it
21 applies to us because of the affiliated language. And what
22 he said was I always -- and he says it again in his
23 declaration in this case, the last paragraph of his
24 declaration, he said at least with respect to physical, I
25 always understood that this imposed an obligation to us to

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1 agree to agree.

2 Mr. Busch said this case is about transparency,
3 and that we want better -- we want better audit rights, we
4 want a greater visibility into what Apple did. If that's
5 the case, and "will be licensed" means that there has to be
6 a license in the future, he could have asked for it because
7 he said these additional terms that I want. What he's not
8 free to say is I'm not going to grant the license for that
9 kind of use.

10 Now, he then says that the -- he says that I
11 misrepresented the Reinhardt case. This is the case from
12 the Southern District of New York because in this case the
13 provision that I cited about now known or known technology
14 that -- the distribution know known or hereafter known
15 applies only to the sound recording rights. And he says it
16 doesn't apply to composition rights and, therefore, we've
17 got you, you should have made it clear, you should have
18 made it clear.

19 Well, in fact, your Honor, the language that was
20 discussed in the Reinhardt case with respect to now or
21 hereafter known and I'm looking at page 354 of the Court's
22 opinion, the language about now known or hereafter known in
23 that case dealt with records, phonograph records for master
24 recordings. It was the same type of provision that you
25 have at issue here.

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1 He also, by the way, said that there's a critical
2 difference in the Reinhardt case because he said that the
3 publisher -- what he's trying to say is the person who
4 stands in the position of Mr. Martin and the Eight Mile
5 Style plaintiffs that person has granted the license for
6 digital uses, or that the license said that it was -- it
7 was electronically distributed duplicated non-physical
8 digital copies. He said that wasn't here, you should have
9 had it in the 1998 and 2003 agreement. He's wrong. That
10 is not the language. The party that was the analogous to
11 Mr. Martin was the plaintiff, Mr. Reinhardt who had the
12 composition right.

13 What he says -- and there's a very good reason
14 why his agreement didn't say anything about digital copies
15 because the band he was engaged with, the Ramones, they
16 made music in the early '80s. That was before we even had
17 distribution. It's not covered there.

18 The language that he was quoting is the language
19 that is from the record companies -- the record companies'
20 agreements with the digital provider. It's just not
21 applicable.

22 Most of Mr. Busch's argument in terms of the law
23 and contract interpretation is you've got to look at the --
24 the Court has to receive extrinsic evidence. The question
25 isn't whether the Court has to receive the extrinsic

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1 evidence, the principle of California law is that one thing
2 that is clear the extrinsic evidence cannot be introduced
3 to be the exact opposite of what the agreement says. If
4 the agreement is not reasonably susceptible to that
5 agreement you don't consider the extrinsic evidence.
6 That's the Reinhardt case. That's the BMW case that we've
7 cited.

8 He then says that I misrepresented his position
9 on Section 115 about -- when I said their argument is that
10 under Section 115 by virtue of the -- provided different
11 royalty rates that DPDs are inapplicable to it. In fact,
12 it's the heading of the argument in his brief that by
13 virtue of Section 115, controlled composition clauses or
14 the mechanical royalties provisions is inapplicable to
15 DPDs. What it said was because there's a different rate
16 that provision is rendered absolute. But sometimes there
17 are two things that the controlled composition clause says.
18 It really says the rate and the rate will be different by
19 virtue of 115, but it also says will be licensed.

20 I don't want to go through all of the points. I
21 will say a couple of things. Number one, the Blair
22 deposition excerpts that he cited in Exhibit 10 did not say
23 that she understood that this was a test. The deposition
24 excerpt of Mr. Ferrante that Mr. Busch introduced where he
25 said Mr. Ferrante said if there was any ambiguity in the

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1 agreement, not whether there was an advice letter, the
2 deposition expert cuts off where it says did they not send
3 an advice letter in the case of Eight Mile Style because
4 they knew about objections, didn't reproduce the answer,
5 the reason is that Mr. Busch didn't ask --withdrew the
6 followup question.

7 The third thing is -- he says the most damning
8 evidence here is "Lose Yourself" in the fact that they
9 wanted information about whether the license was effective
10 and we supposedly waited until the end of discovery to tell
11 them. What we looked for -- when we did look, we looked to
12 see whether there was anywhere in Universal's files a
13 signed copy of the "Lose Yourself" agreement that Mr.
14 Martin sent back. We didn't find one, and when we couldn't
15 find one, and we knew for certain we couldn't find one, we
16 told them that.

17 Now, he says we then -- he says -- he says, Mr.
18 Martin terminated that agreement and the most damning
19 evidence of Universal's position that it knew that it
20 needed some separate license, that it obtained a compulsory
21 license. Not so.

22 What we said in a letter that is attached as an
23 exhibit, a reply declaration, is that the question of our
24 rights to "Lose Yourself" will be determined by the Court.
25 We think that what you've done in terms of trying to

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1 terminate this is simply a -- it came after we filed our
2 summary judgment motion, that this was something that was
3 done to try to give you better evidence in the case. We
4 said we didn't want to be distracted by it so there was no
5 doubt that we had the right, we were doing that. It simply
6 cannot be the case. If Mr. Martin believed as he said he
7 did in his deposition, that he had intended to grant the
8 license, that he intended it to be effective, it would have
9 been and it could have been terminated. He didn't need us
10 to say anything about whether it was terminated. He could
11 have said for the last year of discovery. He could have
12 said I don't know whether you think it's effective, but
13 just so there's no doubt I'm terminating it now, and he
14 didn't.

15 On the affiliated versus unaffiliated
16 distributor/licensee point, your Honor, Mr. Busch said it's
17 interesting we could construe the language potentially to
18 mean maybe we should have the right, maybe under some
19 circumstances we could have the right to deal with it.

20 The problem is there's no reasonable construction
21 which the language is susceptible for them saying that they
22 have to have that direct relationship. There's nothing
23 that says they have to. In fact, your Honor, if you look
24 at the expert report that's submitted by their expert
25 witness on industry practice and custom, Mr. Sullivan, Mr.

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1 Sullivan's declaration at Exhibit -- it's Exhibit 1 of his
2 expert report, page 14 of that expert report what he says
3 there are publishers who would like that but nobody
4 actually does it, the law doesn't require it, the law
5 doesn't require that there be a direct relationship.
6 Publishers would like to change that. And Mr. Sullivan
7 talks about a statute that Congress had considered adopting
8 but it didn't pass during the last session and it's back
9 again that would create more of a direct relationship
10 between the licensees. He says it doesn't exist in the
11 industry, it can't be the case, but it's something that's
12 not required and confused by their own expert, is actually
13 a requirement.

14 I'll get to -- the third-party agreement, mainly
15 what Mr. Busch said was that the documents were produced
16 after the close of discovery and he would have had to go
17 out and depose the world, but we said he could take one
18 deposition. That's not what happened.

19 We set forth -- and we'll get to this when we
20 deal with the motion to exclude. There was a motion that
21 was directed to this and there's a Court order. Mr. Busch
22 never once said to us, I would need to depose anyone. What
23 he said was, I'm going to move, I'm going to move, I'm
24 going move to strike all of these.

25 If the Court has any further questions --

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1 **THE COURT:** No other questions.

2 Has everybody said all they have to say about
3 this summary judgment?

4 **MR. BUSCH:** I think so, your Honor.

5 **THE COURT:** I think the summary judgment must be
6 denied in this case. We're going to have to try it anyway;
7 is that right?

8 **MR. BUSCH:** Yes, your Honor.

9 **MR. KLAUS:** I'm sorry, your Honor?

10 **THE COURT:** And there are a number of questions of
11 fact remaining so it will be denied.

12 **MR. KLAUS:** One question just to make sure we're
13 clear, you said the case would have to be tried anyway
14 regardless of the summary judgment motion, and I didn't --

15 **THE COURT:** No?

16 **MR. KLAUS:** I think if the summary judgment motion
17 is granted as to the copyright claim that deposes of the
18 case.

19 **THE COURT:** No, I said definitely no. It has to
20 be tried, I'm afraid. There are a number of questions of
21 disputed fact here.

22 All right. The motion for striking --

23 **MR. KLAUS:** The motion to strike the declaration
24 of Patrick Sullivan.

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1 **MR. BUSCH:** You're going to hear the defense
2 motion to strike --

3 **THE COURT:** Go ahead, and make it fast.

4 **MR. KLAUS:** Yes, your Honor.

5 In terms of this motion, it may be moot if the
6 Court is denying it, but to the extent the Court's denial
7 would be based on Mr. Sullivan's declaration and the chart
8 that was attached as Exhibit 2, our argument is that it's
9 undisputed that the attorney wrote the entire thing. He
10 admitted he didn't change a word. The email trail shows
11 that it was done by the attorney saying we need you to
12 respond to these other agreements. And in deposition, he
13 said he admitted that he didn't know what some of the
14 things in the chart actually meant.

15 **THE COURT:** But you filed a response; didn't you?

16 **MR. KLAUS:** I'm sorry? We did, indeed, submit a
17 response if it's treated as legal argument. Our point,
18 your Honor, was that it was a -- the Court was clear and
19 there was more than 28 pages of briefing, the Court had
20 denied it, and we tried to get our brief done within that
21 space and time.

22 **THE COURT:** All right. Thank you.

23 Response?

24 **MR. BUSCH:** Very briefly. I'll try 30 seconds or
25 less.

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1 Response is that Mr. Sullivan drafted his expert
2 report. The uncontradicted evidence is that he reviewed
3 these agreements as part of the preparation for the expert
4 report. My office did working with him draft a report,
5 sent it to him for review and everything else, and he
6 confirmed it. And there's no law that says you should
7 strike it under the circumstances. At most, there are some
8 gray issues, and that's basically it, your Honor.

9 **THE COURT:** Any rebuttal?

10 **MR. KLAUS:** The only rebuttal point is, your
11 Honor, in his deposition he said he didn't know what they
12 meant. It wasn't the case of the attorney helping the
13 expert, it was the case of something being done.

14 **THE COURT:** It will be received, it is received
15 and the motion's denied.

16 Now, we have --

17 **MR. BUSCH:** Plaintiffs' Motion to Exclude Late-
18 Produced Documents.

19 **THE COURT:** Thank you.

20 Let's go.

21 **MR. BUSCH:** I apologize.

22 Your Honor, our brief sets forth the chronology
23 in this case, but just very briefly. The defendants in
24 this case did not deem it fit to serve Rule 26 disclosures
25 on us. We served document requests and interrogatories in

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1 discovery that certainly asked for production --

2 **THE COURT:** Were you prejudiced?

3 **MR. BUSCH:** Yes.

4 **THE COURT:** How?

5 **MR. BUSCH:** Prejudiced this way, all of these
6 documents were produced after the close of discovery.
7 We've had absolutely no ability to challenge any of these
8 licenses or do any of those things you would need to do --

9 **THE COURT:** Would you like more discovery?

10 **MR. BUSCH:** On that issue? Yes.

11 **THE COURT:** Well, you may have it.

12 The motion -- well, go ahead, respond to the
13 motion.

14 **MR. KLAUS:** The -- two quick points, your Honor.
15 In terms of -- this was done -- there were, indeed,
16 discovery requests, as there is in every case. The day of
17 our hearing before the magistrate judge in the case we came
18 to an agreement about how these would be entered. It turns
19 out that the discovery cutoff -- it was known that there
20 would be additional documents. This is the first time I've
21 heard Mr. Busch say that he would actually like additional
22 discovery.

23 I would point out just one other thing, your
24 Honor, because -- we're not the only party that produced
25 the documents after the close of discovery. There were

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1 documents that were produced by the plaintiffs --

2 **THE COURT:** So do you need discovery?

3 **MR. KLAUS:** Yes, yes, we do.

4 **THE COURT:** All right. Everybody may have
5 discovery for a month, right now, the month following this.

6 **MR. KLAUS:** I think we have a joint request in
7 terms of a timetable for discovery, your Honor, which is we
8 are both involved in the Los Angeles case, F.B.T. That
9 case is scheduled -- the trial there is scheduled to start
10 February the 3rd,^a and we are -- both of us are in the
11 unhappy situation right now of dealing with motions and
12 pretrial filings and the like.

13 **THE COURT:** I'm sure.

14 **MR. KLAUS:** And I think that the problem for the
15 next month is --

16 **THE COURT:** All right. Do you need the month
17 after that?

18 **MR. KLAUS:** I think the reality --

19 **MR. BUSCH:** April 1st.

20 **MR. KLAUS:** I think that --

21 **THE COURT:** April?

22 **MR. BUSCH:** Our trial starts February 3rd and
23 we're going to be in trial for probably two weeks. So once
24 we conclude that, 30 days after -- March 15th or so --

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1 **MR. KLAUS:** March 1st.

2 **THE COURT:** All right. Discovery until April 1st.
3 You'll have to see the clerk as that will move back all
4 your dates.

5 **MR. KLAUS:** I understand that. Thank you.

6 **MR. BUSCH:** If I may have some followup -- some
7 clarification, that's only on this issue -- on these two
8 issues that relate to these documents.

9 **THE COURT:** Only on this issue.

10 **MR. BUSCH:** Thank you.

11 **THE COURT:** Of the alleged late --

12 **MR. KLAUS:** And just so I'm clear, it works both
13 ways.

14 **THE COURT:** Yes.

15 And now we have --

16 **MR. KLAUS:** The defendants' motion to bifurcate
17 the case.

18 In terms of the motion to bifurcate, I don't
19 think we knew that was going to be on the calendar today.
20 I think -- as part of that with respect to awaiting the
21 summary judgment motion is now moot, the issue as to
22 whether we should await a liability determination at trial
23 before conducting what would be extensive and burdensome
24 discovery I think we're making -- it's going to be a bench
25 trial in the case and, therefore, what we submit is that it

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1 would be much more efficient and less expensive and I think
2 frankly it would be impossible for us to get the damages
3 discovery done in the 30-day time frame we talked about
4 following the other trial.

5 **THE COURT:** Thirty days? It takes to April to get
6 one point.

7 All right. Response.

8 **MR. BUSCH:** We vehemently disagree. We think it
9 would be much more expensive for us if we have to go
10 through a trial and then -- it's not lengthy -- the only
11 thing we need to know is what their profits are. It's not
12 going to take that much. We would ask -- the bifurcation
13 is disfavored, that we should try everything in one case.
14 We don't want two trials on this, one trial. The testimony
15 on damages will be probably short and sweet, and the
16 discovery will be I don't think that expensive or that
17 extensive so we're going to have to April 1st to do on the
18 late produced-documents. You know, as I'm thinking about
19 it why don't we just work that into it as well?

20 **THE COURT:** Work what?

21 **MR. BUSCH:** Damage discovery and have that --

22 **THE COURT:** That has not been done?

23 **MR. BUSCH:** No, we've been --

24 **MR. KLAUS:** Damage discovery has not been done
25 because it's not -- Mr. Busch is not being candid. It is

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1 not a simple matter when he says damages discovery because
2 he understands from other cases that he's had with
3 Universal that the process of --

4 **THE COURT:** But we don't care about other cases.
5 We have only this one, and this one you assumed this motion
6 would be granted; is that right?

7 **MR. KLAUS:** I did not assume that this motion
8 would be granted. The motion with respect to -- there's a
9 part of it which is damages discovery before summary
10 judgment, but there's also damages discovery for the trial,
11 your Honor.

12 And, again, in terms of bifurcation, there's not
13 a question of the same fact finder being confused or having
14 to wait. The damages discovery will be burdensome and
15 expensive, and could entirely be mooted. We just heard
16 from Mr. Busch --

17 **THE COURT:** Completely different witnesses?

18 **MR. KLAUS:** In terms of the damages discovery?
19 Yes. The people who would be testifying to damages would
20 be an internal finance person at Universal who would
21 testify to the accounting issues. There probably would be
22 an expert witness. They have an auditor who is there
23 expert witness on the damages issue in connection with the
24 Los Angeles case. I assume he would be their expert. It
25 would be completely different witnesses on completely

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1 different issues with respect to damages.

2 **MR. BUSCH:** Your Honor, just like in any case, we
3 would have probably somebody from -- one person from
4 Universal who would be deposed.

5 **THE COURT:** Completely different witnesses but not
6 completely different.

7 **MR. BUSCH:** Correct. Someone from Universal.
8 Somebody from Apple, and maybe an expert. A document
9 request, we're looking for a profit and loss statement.

10 I mean, this happens in every case, we can
11 probably do it over the course of a couple of days in one
12 trip, in a couple of depositions. It's not that
13 burdensome. And it would allow for one trial and not the
14 prospect which would be overwhelming to have a trial --
15 ramp up for trial, have a trial, and if we win, then have
16 to go through -- do the discovery all at once.

17 **MR. KLAUS:** Your Honor, the reason that he's
18 saying the depositions wouldn't be so difficult is the
19 discovery burden on this will fall entirely on us. As the
20 declarations made clear, because the profit and loss
21 statements were not kept on an individual basis, it would
22 take an enormous amount of time to complete them. It's
23 entirely a hundred percent different witnesses and that
24 expense and second trial on damages could be moot if the
25 disputed fact questions are resolved in our favor at the

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1 trial, your Honor.

2 **THE COURT:** I will deny this motion. It really is
3 unconscionable that you have not done discovery already on
4 that issue among all the others, but the motion is denied.
5 We'll try it altogether.

6 **MR. BUSCH:** So, your Honor, just to understand
7 your Honor's orders, I want to make care, we can do
8 discovery up through the date of --

9 **THE COURT:** Damages discovery and --

10 **MR. BUSCH:** Thank you.

11 **MR. KLAUS:** Your Honor, if I could, and I regret
12 asking, but we said that the April 1st would give us the
13 time to do the discovery on the other issues in light of
14 the F.B.T. trial.

15 **THE COURT:** April 1st will have to do.

16 **MR. BUSCH:** Thank you, your Honor.

17 **THE CLERK:** The orders, the motion for summary
18 judgment, plaintiff --

19 **MR. BUSCH:** We'll draft them all.

20 **THE CLERK:** Prepare an order on that.

21 **MR. BUSCH:** We'll draft all the orders.

22 **THE CLERK:** What you can do on the motion to
23 exclude late-produced documents, put the thing in there
24 about the discovery.

25 **MR. BUSCH:** Okay.

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1 **THE COURT:** Court is in recess.

2 (Proceedings concluded, 11:25 a.m.)

3 -- --- --

4 CERTIFICATE

5

6 I, JOAN L. MORGAN, Official Court Reporter for
7 the United States District Court for the Eastern District
8 of Michigan, appointed pursuant to the provisions of Title
9 28, United States Code, Section 753, do hereby certify that
10 the foregoing proceedings were had in the within entitled
11 and number cause of the date hereinbefore set forth, and I
12 do hereby certify that the foregoing transcript has been
13 prepared by me or under my direction.

14

15

16

17

S:/JOAN L. MORGAN, CSR

18

Official Court Reporter

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Detroit, Michigan 48226

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21 January 7th, 2009

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